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No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON and WESTMORELAND COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF THE NATIONAL COAL ASSOCIATION AND

BRIEF OF NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The National Coal Association (NCA) respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the Petition of Mullins Coal Company, Incorporated of Virginia, et al., in the above-captioned case. This motion has been made necessary by the refusal of Respondents, Glenn Cornett and Gerald R. Stapleton to consent to the filing of this brief. Written consent for NCA to file its brief *amicus curiae* has been provided by the Solicitor General and all Petitioners.

NCA's attached brief provides more detail concerning its interest in the disposition of this case as well as arguments in sup-

port of Petitioners. Accordingly, NCA respectfully moves for leave to file this brief amicus curiae.

Respectfully submitted,

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March 19, 1987

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BRIEF OF NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Coal Association ("NCA") is a trade association comprising approximately 125 members. Its coal-producing members account for over fifty percent of the nation's commercial coal production and operate in every coal-producing sector of the United States. In addition to coal mining companies, the NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants

under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, in two direct ways: (1) as individual coal mine operator defendants in certain black lung cases, 30 U.S.C. § 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF"), 26 U.S.C. § 4121. The BLDTF is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2). The BLDTF is used to pay black lung compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or, in cases in which a responsible coal operator defendant cannot be identified, 26 U.S.C. § 9501(d).

The tax paid by coal producers into the BLDTF is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal, 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $3.403 billion in tonnage taxes from coal producers since 1978;[1] in fiscal year 1986 the nation's coal producers paid $630,407,573 into the BLDTF.[2]

Despite these substantial tax revenues, there has been a continuing shortfall between black lung payment obligations of the BLDTF and the income from the producers' tax. Indeed, the BLDTF has paid out over $4.93 billion in compensation since 1978,[3] and in fiscal year 1986, disbursed $629 million.[4] The massive growth in BLDTF liability is to a substantial degree attributable to the approval of approximately 120,000 claims by

[1]Staff of Joint Committee on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Department of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

[2]U.S. Dept. of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 31, 1986) (available through the U.S. Treasury Department).

[3]*See, supra* note 1.

[4]*See, supra* note 2.

the Department of Labor (and to a lesser extent, the Social Security Administration) under the requirements of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95, including the 20 C.F.R. § 727.203 interim presumption.[5] The approval rate greatly exceeded all Congressional projections about the impact of the 1978 amendments.[6]

To try to meet the shortfall between compensation levels and BLDTF revenue, the producers' tax has been increased twice from the 1978 rate of $.50 per ton on underground coal and $.25 per ton on surface-mined coal.[7] In 1981, the tax was increased 100% to $1.00 per ton (underground) and $.50 per ton (surface).[8] In 1985, the Administration proposed to again raise the tax, this time by 50%. Congress, however, acknowledging that the coal industry *was in financial difficulty and should not be*

[5]Office of Workers Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Department of Labor) [hereinafter 1987 Black Lung Claims Status Report]. From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously-denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 [hereinafter the 1978 Amendments] and referred to the Secretary of Labor for payment from the Fund, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF because of the 1978 Amendments totals approximately 120,000. 1987 Black Lung Claims Status Report, *supra*.

[6]H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1978 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund*, 97th Cong. 1st Sess. 23 (Comm. Print 1981) [hereinafter 1981 Oversight Subcommittee Background Report.).

[7]Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a), § 92 Stat. 11 (1978).

[8]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635.

saddled with added black lung taxes, enacted only a 10% tax increase to reach the current levels of $1.10 per ton (underground) and $.55 per ton (surface).[9]

In addition to the two tax increases, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. These advances must be repaid by the BLDTF to the general treasury, with interest. 26 U.S.C. § 9501(c), (d)(4).[10] The present cumulative debt of the BLDTF in unpaid advances and interest is $2.88 billion, of which $1.032 billion is interest on advances as accumulated.[11]

Under a 1981 amendment to the Internal Revenue Code,[12] the producers' tonnage tax is to revert to the lower 1978 rate by January 1, 1996, or when there is neither a balance of repayable advances nor interest owed by the BLDTF, whichever date is earlier. With the current $2.88 billion debt of the BLDTF, the ability of the BLDTF to achieve solvency by 1996 is dubious, even under pre-*Stapleton* conditions. When the Administration attempted to increase the tax by fifty percent in 1985, the Department of Labor predicted that the advance and interest necessary to meet BLDTF obligations would exceed $30 billion by the year 2010. H.R. Rep. No. 241, 99th Cong., 2d Sess., 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-54. The President, moreover, proposed in his Fiscal Year 1988 Federal Budget that the tax be increased to raise $400 million in additional revenues.[13] This revenue proposal would mean an increase of the tax to approximately $1.75 per ton on underground coal and $.88 per ton on surface-mined coal.

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[9]*See* remarks of Senators Heinz and Warner, 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985). Consolidated Omnibus Budget Reconcilation Act of 1985, Pub. L. No. 99-272, § 13203(a), 100 Stat. 312 (1986) [hereinafter 1986 BLDTF Amendment].

[10]The 1986 BLDTF Amendment placed a five-year moratorium on interest accruals with respect to advances to the BLDTF, 1986 BLDTF Amendment, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (Apr. 7, 1986).

[11]*See, supra* note 1.

[12]Black Lung Benefits Revenue Act of 1981, *supra* note 8.

[13]Budget of the U.S. Government, Fiscal Year 1988, at 2-41.

The Fourth Circuit's decision in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (1986) ("*Stapleton*") makes invocation of the interim presumption under 20 C.F.R. § 727.203(a) almost a certainty for every claimant. Invocation is tantamount to an award in the claims to be paid by the BLDTF, and measurably increases the likelihood of an award in claims that may become the liability of an individual mine owner. *Stapleton* therefore will greatly expand the liability of both individual coal mine operators and the BLDTF. As a result, increased revenues will be needed at a time when the BLDTF already is in a precarious financial state. *Stapleton* is clearly of tremendous importance to the coal industry and NCA.

SUMMARY OF ARGUMENT

Amicus NCA endorses fully the contentions of Petitioner Mullins Coal Company, Inc., et al., and presents additional arguments on selected points to assist the Court.

1. It has been the longstanding agency practice of the Department of Labor and the Social Security Administration to require black lung claimants to establish facts by a preponderance of evidence before invoking a black lung presumption. Hundreds of thousands of black lung claims have been adjudicated in this manner.

Coal operator defendants have reasonably based their defense efforts on the agency practice of weighing evidence prior to invocation, and have concentrated on challenging claimants' factual evidence prior to invocation. The radical change in the law by the *Stapleton* single-item invocation rule jeopardizes thousands of cases that had been decided under this consistent agency practice or which remain pending before the Benefits Review Board or the U.S. Courts of Appeal.

The historic Department of Labor interpretation is a permissible construction of a technical regulation and is eminently

worthy of judicial deference. *Stapleton* departs from the uniform application of the preponderance rule.

2. Single-item invocation is neither ameliorated nor cured by the 20 C.F.R. § 727.203(b) rebuttal inquiry. The Fourth Circuit relied heavily on the perceived capacity of the rebuttal process to undo any excesses of single-item invocation and ensure that all relevant medical evidence is considered in the ultimate eligibility determination. Decisions of circuits interpreting rebuttal provisions and practical experience in rebuttal belie this theory. Rebuttal is extremely difficult.

The significant easing of presumption invocation requirements by *Stapleton* and the inherent difficulty of rebuttal are particularly acute with respect to the BLDTF and its administration by the Department of Labor. The Department has neither the regulatory resource authority, nor the mission to build a rebuttal case.

Invocation is tantamount to entitlement in BLDTF cases and neither the coal operator nor any other party may challenge a BLDTF claims allowance.

3. The Administrative Procedure Act ("APA") is specifically incorporated into the Black Lung Benefits Act. Title 5 U.S.C. § 556(d), provides that the "proponent"of any agency rule has the "burden of proof," which must "be . . . supported by and in accordance with the reliable, probative, and substantial evidence and that a party is entitled to cross-examination as may be required "for a full and true disclosure of the facts." These rights are essential to ensure that black lung adjudication is conducted *fairly*, without granting one party a superior position over another.

The Fourth Circuit's decision dismisses the imperative role of the APA in black lung evidentiary matters and is an impermissible supersedure of 5 U.S.C. § 559.

ARGUMENT

I. DEFERENCE MUST BE ACCORDED TO THE LONG-STANDING AND REASONABLE AGENCY INTERPRETATION REQUIRING WEIGHING OF CONFLICTING EVIDENCE PRIOR TO INVOCATION OF THE INTERIM PRESUMPTION

A. The Department of Labor's Application of Pre-Invocation Weighing has Controlled the Adjudication of Black Lung Claims For Many Years.

Rebuttable evidentiary presumptions have been employed in the adjudication of black lung claims under both Part B of the black lung program, administered by the Social Security Administration ("SSA"), and under Part C, administered by the Department of Labor ("DOL"). These presumptions have both statutory and regulatory bases. 30 U.S.C. §§ 921(c)(1), (2), (4), (5); 20 C.F.R. § 410.490 (1986) (Pet. App. 163a); 20 C.F.R. § 410 Subpart D (1986); 20 C.F.R. 727.203(a) (1986) (Pet. App. 156a-158a); and 20 C.F.R. Part 718 (1986).

SSA has consistently weighed all relevant evidence prior to invocation, be it conflicting X-rays or pulmonary function studies. The presumption has been conferred by SSA only where the best and most reliable evidence justifies invocation. This approach has caused no great hardship to claimants. About 400,000 claims out of 534,000 claims filed with SSA have been awarded under this standard.[14] Hundreds of reported cases and

[14] 1981 Oversight Subcommittee Background Report, *supra* note 6 at 15, The Comptroller General of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits Without Adequate Evidence of Disability* (1980) citing U.S. Department of Health and Human Services (Social Security Administration) figures. Black lung claim statistics must be viewed in the context of what are effectively two black lung programs. The Social Security Administration ("Part B") portion of the program generally covered claims filed before July 1, 1973 and paid benefits from general revenues (Part A of the statute is a general definitional section). The DOL portion of the program ("Part C") mandates payment of benefits by the BLDTF or coal operator defendants. In many instances, claimants denied under the SSA, Part B program refiled under the DOL, Part C portion and thus produced statistics under both parts of the statutory scheme.

thousands that are unreported illustrate that the recurring focus of Part B appeals has been whether the presumption was properly invoked in the face of conflicting evidence. A sampling of the many cases is provided in the briefs of Petitioners and the Government. The Fourth Circuit itself has also emphasized the propriety of such pre-invocation weighing:

> . . . we know of nothing in the Act, or in the 1972 amendments, or in their legislative history, to indicate that this fact [X-ray invocation] is not required to be proved by a preponderance of evidence, as is every other fact which is not presumed.

Sharpless v. Califano, 585 F.2d 664, 667 (4th Cir. 1978).

In 1978, Congress directed the Secretary of Labor to promulgate his own version of the interim presumption for application in review of pending and previously denied Labor Department cases. 30 U.S.C. § 902(f)(2). The legislature presumably was aware of the case law ratifying pre-invocation weighing. *See Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection,* 106 S. Ct. 755, 769-60 (1986). The 1978 black lung presumption, 20 C..F.R. § 727.203, was based on Congress' understanding that claimants had the burden of proof to establish the prerequisite invocation facts by a preponderance of evidence.

Since 1978, when 20 C.F.R. § 727.203(a) was promulgated, the Secretary has specifically maintained that all like-kind evidence should be weighed prior to invocation of the presumption. *See, e.g.,* Brief for Director, Office of Workers' Compensation Programs, U.S. Department of Labor, *Consolidation Coal Co. v. Sanati,* 713 F.2d 480, (4th Cir. 1983). In *Sanati,* which was overruled by *Stapleton,* the Department of Labor and the employer both argued successfully that the correct burden of proof on invocation was a preponderance of the evidence standard, thus requiring weighing. Other Part C case

law reflects the consistent agency practice of weighing conflicting like-kind medical evidence prior to invocation. *See, e.g., Consolidation Coal Co. v. Chubb,* 741 F.2d 968, 972 (7th Cir. 1984) and *Markus v. Old Ben Coal Co.,* 712 F.2d 322 (7th Cir. 1983).

Well over 275,000 black lung claims[15] adjudicated under the Department of Labor program were subject to the interim invocation presumption at issue here. In all of those claims, invocation evidence was analyzed by the Department of Labor under a preponderance of the evidence standard. The mine operator defendants in these cases have relied upon invocation being based on a preponderance of the reliable, relevant evidence. Defendants have expended vast resources in reliance on this consistent interpetation of the invocation standard by the Department of Labor and on the expectation that this powerful presumption would continue to be so interpreted. *Stapleton* reflects the first departure from the uniform application of the preponderance of the evidence standard to facts invoking the presumption. To adopt the *Stapleton* single-item invocation holding now would assuredly necessitate the retrial of thousands of claims, cause a substantial disruption in the orderly administration of the program, and, without doubt, add billions of dollars in unanticipated and unfunded black lung program costs.

An administering agency's interpretation of its own regulation is given controlling weight if it is reasonable and not directly contrary to statute. *United States v. Larionoff,* 431 U.S. 862, 872 (1977); *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 118 (1978). Where, as here, the interpretation has been consistent and longstanding, the case for deference is even stronger. *United States v. National Ass'n of Sec. Dealers,* 422 U.S. 694, 719 (1975).

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[15] 1987 Black Lung Claims Status Report, *supra* note. 5.

The Department of Labor's balancing of all relevant pre-invocation facts is certainly a reasonable interpretation[16] of 20 C.F.R. § 727.203(a). Its consistent application by the DOL to hundreds of thousands of claims – resulting in an approval of tens of thousands of them – belies any argument that this interpretation is contrary to the remedial purposes of the Act.

Rather than confront these arguments and the abundant case law on weighing prior to the ALJ invocation of black lung presumptions, the *Stapleton* court relied heavily, 785 F.2d at 451, 452, 453, 460, on a law review article[16] reporting that in draft form, 20 C.F.R. § 727.203 was reviewed in 1978 by non-elected staff members of certain key Congressmen and private black lung claimants' associations, who allegedly importuned the Department of Labor against pre-invocation weighing. The Fourth Circuit elevated this unelected staff and claimant effort – in which the coal industry had neither notice or a role – into agency intent and congressional approbation.

There is simply no authority for treating such anecdotal materials as legislative intent or agency explanation of a technical rule. Moreover, the reliance on Congressional staff personnel opinion amounts to crediting an informal legislative veto over the Department of Labor rulemaking. Such thinking appears to clash with the separation of powers principles re-articulated in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), which struck down a formal legislative veto. *See also Bowsher v. Synar,* 106 S. Ct. 3181, 3189 (1986).[17]

[16]Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues,* 83 W.Va. L. Rev. 869 (1981).

[17]The Fourth Circuit's refusal to defer to the agency's practice of weighing cannot be defended by reference to the allusions to the Congressional staff meetings with claimants' groups for two other reasons. First and foremost, the Department of Labor disavows the law review article's description of events and maintains that the consistent agency position has been pre-invocation weighing. Second, another portion of the article in question notes that with respect to 20 C.F.R. § 727.203:

> . . . it has been established that a claimant . . . bears the burden of proving the facts necessary to invoke the presumption by a preponderance of the credible evidence.

Solomons, *supra* note 16, at 903.

In sum, the consistent Department of Labor interpretation and application of 20 C.F.R. § 727.203(a) is a reasonable and fair approach that is entitled to substantial judicial deference. The rule should not be different for the many thousands of claims[18] which remain to be decided.

B. Rebuttal is Effectively Unavailable as a Cure for the Error of Single-Item-Invocation.

The Fourth Circuit in *Stapleton*, 785 F.2d at 434, speculates that any error arising from invocation of the § 727.203(a) presumption on the basis of a single item of qualifying evidence can be corrected[19] in the 20 C.F.R. § 727.203(b) rebuttal inquiry. Practical concerns as well as the decisions of the circuits interpreting rebuttal provisions nullify this position.

The rebuttal process is from the outset a "heavy burden" for employers. *Kaiser Steel Corp. v. Director, OWCP,* 748 F.2d 1426, 1431 (10th Cir. 1984). The rebuttal provisions are framed in terms of ultimate conclusions that intermix medicine and law.

[18]See Brief for Federal Respondent at 14, *Mullins Coal Company v. Director, OWCP,* No. 86-327 (Dec. 1986), stating that at least 10,000 pending cases involve the 20 C.F.R. § 727.203(a) presumption. Each black lung claim costs between $118,315 for an unmarried miner and $185,656 for a miner with an eligible spouse. U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefit Act* 32 (1981).

[19]The Third Circuit has followed *Stapleton* in *Revak v. National Mines Corp.,* 808 F.2d 997 (3d Cir. 1986). That court was also direct in its resort to the 20 C.F.R. § 727.203(b) rebuttal inquiry as a "cure-all" to any excesses of single-item invocation:

> The appellees argue that invocation of the interim presumption on the basis of one item of evidence gives disproportionate effect to that item of evidence offered by the claimant. This argument is unconvincing, for the rebuttal phase rights any alleged imbalance.

808 F.2d at 1001 n. 7.

Rebuttal facts are not necessarily medical facts and are foreign to medical witnesses. Traditional and sound medical evidence plays an important but rarely conclusive role in 20 C.F.R. § 727.203(b) rebuttal.

Rebuttal pursuant to 20 C.F.R. § 727.203(b)(4) (miner does not have pneumoconiosis) may be precluded absent proof positive that some form of "legal" pneumoconiosis (20 C.F.R. § 727.202) unknown to medical science is not present. *Pavesi v. Director, OWCP,* 758 F.2d 956, 965 (3d Cir. 1985). Numerous negative X-rays may still be insufficient to prove the absence of legal pneumoconiosis, and expert medical witnesses cannot generate evidence to prove the absence of a "legal" disease. Moreover, rebuttal on proof of the absence of pneumoconiosis 20 C.F.R. § 727.203(b)(4)) may be blocked if there has been invocation via X-ray proof of pneumoconiosis 20 C.F.R. § 727.203(a)(1). Negative X-ray evidence on rebuttal also inevitably collides with the 30 U.S.C. § 923(b) prohibition on denying a claim ". . . solely on the basis of the results of a chest roentgenogram."

Rebuttal, furthermore, is an extremely arduous task if the miner is disabled by a non-occupational condition such as cigarette-induced lung disease or congenital cardiovascular disease. At least three circuits have suggested that 20 C.F.R. § 727.203(b)(2) rebuttal is substantially curtailed if the miner is impaired from working by any medical condition. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162 (3d Cir. 1986); *Sykes v. Director, OWCP,* ___ F.2d ___, No. 85-1441, slip op. at 9 (4th Cir. Mar. 3, 1987); and *Wetherill v. Director, OWCP,* ___ F.2d ___, No. 86-1053, slip op. at 6 (7th Cir. Feb. 25, 1987).[20]

[20]Prior to *Stapleton,* the Fourth Circuit held that objective evidence that is outside the classifications for total disability in the regulation ("non-qualifying evidence") is usually not sufficient for rebuttal under 20 C.F.R. § 727.203(b)(2). *Wilson v. Benefits Review Board,* 748 F.2d 198, 201 (4th Cir. 1984). With respect to rebuttal pursuant to 20 C.F.R. § 727.203(b)(3), the Fourth Circuit has held that a defendant employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment to rebut the interim presumption. *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 123 (4th Cir. 1984).

The combination of *Stapleton*'s easy, single-item invocation with a rebuttal process that clearly eschews objective medical evidence will place a grossly unfair burden on responsible operators. Moreover, coal company defendants have understandably centered their defense efforts on challenging invocation rather than retreating to strategies for rebuttal, which may be illusory as a practical matter. Literally thousands of case records have been assembled and are before the Benefits Review Board and the Court of Appeals challenging invocation; these are rendered virtually obsolete by the single-item invocation theory of *Stapleton.* It is simple enough to say that the consideration of all relevant medical evidence in the rebuttal inquiry preserves fair play. But when that very evidence is consigned to virtual irrelevancy by one legal device after another, the promise of fairness in the proceeding becomes, as Judge Phillips recognized, in *Stapleton,* an empty one. 785 F.2d 446-47 (Phillips, J., concurring in part, dissenting in part).

The situation on rebuttal is even more egregious for the far greater number of cases in which the BLDTF alone is the defendant. The Secretary of Labor's claim-processing regulations in 20 C.F.R. § 725.404-407 demonstrate that the Secretary has neither the mission, nor the resources, to obtain doctors' depositions and otherwise build a rebuttal case. Simply put, invocation equals entitlement in a BLDTF case, a point well known in the black lung community and confirmed in a 1982 General Accounting Office study of hundreds of Department of Labor interim presumption claims:

> In addition, numerous Labor field officials told us that, because rebuttal evidence was not specifically

defined, they ignored medical evidence that could have been used to rebut the claim.

The Comptroller General of the United States, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 13 (1982).

A Department of Labor claims examiner's approval of BLDTF case is also the last word, because neither the coal operator nor any other party may contest a BLDTF claim allowance. 30 U.S.C. § 934 (b)(1)(B).

The Fourth Circuit's reliance on rebuttal to ameliorate single-item invocation is simply wrong.

II. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES WEIGHING OF EVIDENCE BEFORE INVOCATION OF THE INTERIM PRESUMPTION.

The Administrative Procedure Act, 5 U.S.C. §§ 554-559, provides a broad range of procedural rights to claimants and claim defendants. It is beyond dispute that the Administrative Procedure Act applies to black lung benefit hearings. The Black Lung Benefits Act specifically provides for its application. 30 U.S.C. § 932(a), incorporating 33 U.S.C. § 919(d). In accordance with 5 U.S.C. § 556(d), in a black lung benefits hearing, the proponent of a rule or order has the burden of proof, and no rule, order or sanction may issue without "consideration of the whole record" or those parts of the record supported by "reliable, probative, and substantial evidence." Moreover, 5 U.S.C. § 556(d) provides that "[a] party is entitled to present his case or defense . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Thus, the APA grants *both* parties rights, in order to preserve fundamental fairness and avoid a situation in which one party is in a more favorable position than another with respect to the consideration of evidence.

The coal industry has relied on the procedural safeguards of the APA to prevent benefit awards based on evidence that is proven unreliable. The coal industry is entitled to this reliance because the very clear language of the APA permits it. *Stapleton* is the antithesis of the full and fair disclosure of the truth mandated by the APA.

The *Stapleton* court's interpretation impermissibly supersedes the APA's evidentiary requirements. *Rusk v. Cort,* 369 U.S. 367, 379 (1962); *see also* 5 U.S.C. § 559.

The implications of this supersedure are profound. *Stapleton* takes away the employers' right to challenge claimant's evidence at the critical point in a black lung hearing by rejecting the preponderance of the evidence standard of 5 U.S.C. § 556(d) of the APA at the invocation stage. According to *Stapleton,* like-kind evidence should *not* be weighed before permitting claimant to satisfy his burden of proof of invocation. Instead, claimant is entitled to the presumption on evidence which may or may not be reliable or accurate – evidence which can be procured by any claimant with a minimum of effort.[21] The rule in *Stapleton* does not permit the opponent of invocation (the employer) to conduct cross-examination or to oppose unreliable or suspect evidence by the submission of more expert testimony, studies or X-ray readings. The rule in *Stapleton* also disregards the overriding goal of the APA for "full and true disclosure of the facts" by allowing a powerful presumption to control the outcome of a claim based on misleading or incomplete facts.

Stapleton additionally nullifies the Department of Labor's regulations that implement the APA's procedural safeguards and preserve fundamental fairness. *E.g.,* 20 C.F.R. §§ 725.452

[21] *See* J. Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 107 (School of Social Service Administration, Committee on Public Policy Studies, University of Chicago and Center for the Study of Social Policy, Washington, D.C., 1985)

and 725.455(b) (applying the APA to black lung hearings and the presentation of evidence at such hearings); 20 C.F.R. § 725.458 (governing depositions of witnesses).

If the APA cannot be construed to guarantee the orderly and fair consideration of a case, even a black lung case, its application is illusory and its undeniable purpose to eliminate unfairness in administrative proceedings is defeated. The erosion of the APA deprives claim defendants of meaningful review of their evidence and defeats the coal operators' reasonable reliance on APA protections in defending black lung claims. For these reasons alone, the interim presumption under 20 C.F.R. § 727.203 should be restored to its intended function, allowing facts to be presumed only on the basis of reliable, probative and substantial evidence. The APA should be accorded the significance it deserves in the context of black lung evidentiary inquiries.

CONCLUSION

The members of NCA urge the Court to:

(1) reverse that portion of *Stapleton* holding that invocation of 20 C.F.R. § 727.203(a) is satisfied by a single-item of qualifying medical evidence; and

(2) hold that claimants seeking to invoke 20 C.F.R. § 727.203(a) must establish requisite facts and discharge a burden of proof by a preponderance of evidence that requires weighing of conflicting like-kind evidence prior to invocation.

Respectfully submitted,

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